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IN THE

Supreme Court of the United States

October Term, 1935

GOLDEN EAGLE WESTERN LINES, INC., a corporation,

Appellee,

vs.

JOHN D. BINGAMAN, as Commissioner of Revenue of the State of New Mexico; JUAN N. VIGIL, as State Comptroller of the State of New Mexico; FRANK H. PATTON, as Attorney General of the State of New Mexico; JUANITA HILL, as State Gasoline Tax Collector of the State of New Mexico, and CLYDE TINGLEY, as Governor of the State of New Mexico,

No. 520

Appellants.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW MEXICO.

VALLIANT PRINTING CO., ALBUQUERQUE

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Appellee, Golden Eagle Western Lines, Inc., brought suit in the United States District Court of New Mexico against appellants, who are state officers of the State of New Mexico, seeking an interlocutory injunction to restrain appellants from collecting or attempting to collect a state gasoline tax on gasoline bought outside of the State of New Mexico but used in appellee's interstate motor busses over the highways of the State of New Mexico, said tax being claimed to be due under the provisions of Chapter 176 of the Session Laws of 1933. A stipulation of facts was entered into and upon final hearing before a statutory three judge district court a decree of injunction was granted appellee. From this final decree of injunction appellants prosecute this appeal.

QUESTION INVOLVED 2

Does Chapter 176 of the Session Laws of 1933 of the State of New Mexico, insofar as it attempts to levy a tax upon gasoline purchased outside of the State of New Mexico but used in interstate motor busses on the highways of the State of New Mexico, violate Article I, Section 8, Clause 3 of the Constitution of the United States?

PROPOSITION OF LAW 2

The threatened application of Chapter 176 of the Session Laws of 1933 of the State of New Mexico to the appellee, so far as the same relates to gasoline or other motor fuel purchased by appellee outside of New Mexico and used in appellee's vehicles in New Mexico to propel the same in interstate commerce, is not contrary to nor prohibited by Article 1, Section

8, Clause 3 of the Constitution of the United States, because:

(a) When considered in conjunction with Chapter 31, Session Laws of New Mexico for 1931, said Chapter 176 constitutes merely a compensatory and regulatory exaction for the use of the public highways of the State of New Mexico.

(b) Even if said Chapter 176 should be construed as applied to appellee as an excise tax upon the use of gasoline in interstate commerce, it is justifiable as a compensatory and regulatory exaction for the use of state facilities.

(c) The Supreme Court of New Mexico has not construed said Chapter 176, Laws of 1933, in conjunction with Chapter 31, Laws of 1931, so that its application to appellee will be a violation of Article 1, Section 8, Clause 3 of the Constitution of the United States, and

(d) The characterization of Chapter 176, Laws of 1933, by the Supreme Court of New Mexico is not binding upon the Supreme Court of the United States where the question involved is one of deprivation of rights secured by the Federal Constitution.

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c. The state may exact of interstate commerce a reasonable and non-discriminatory charge for the use of state facilities.

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c. The Supreme Court of the State of New Mexico has in neither of the cases mentioned construed the gasoline tax statutes in the manner held by the District Court below.

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GOLDEN EAGLE WESTERN LINES, INC., a corporation,

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JOHN D. BINGAMAN, as Commissioner of Revenue of the State of New Mexico; JUAN N. VIGIL, as State Comptroller of the State of New Mexico; FRANK H. PATTON, as Attorney General of the State of New Mexico; JUANITA HILL, as State Gasoline Tax Collector of the State of New Mexico, and CLYDE TINGLEY, as Governor of the State of New Mexico,

Appellants.

No. 520

APPELLANTS' BRIEF

PRELIMINARY STATEMENT

This case comes on for hearing in this Court upon an appeal by defendants in the lower Court from a decree of injunction of a statutory three-judge Court for the United States District Court of New Mexico.

A STATEMENT OF THE FACTS

The facts in this case are contained in a stipulation of

facts filed in the lower Court and appearing on Pages 29 to 33 of the Transcript of Record. The facts there stated are briefly these: Plaintiff is a corporation foreign to the State of New Mexico. It was and is engaged in the operation of motor busses as a common carrier of passengers across the State of New Mexico. Its operations, so far as New Mexico is concerned, are purely interstate. In the operation of its interstate motor busses it buys gasoline outside of the State of New Mexico, places said gasoline in the fuel tanks on its motor busses and uses said gasoline to propel said vehicles over the state-owned highways of the State of New Mexico. As to the amount of tax claimed to be due to the State of New Mexico, all that appears from the records is that it exceeds the sum of Three Thousand Dollars ($3,000.00).

PROPOSITION OF LAW

The threatened application of Chapter 176 of the Session Laws of 1933 of the State of New Mexico to the appellee, so far as the same relates to gasoline or other motor fuel purchased by appellee outside of New Mexico and used in appellee's vehicles in New Mexico to propel the same in interstate commerce, is not contrary to nor prohibited by Article 1, Section 8, Clause 3 of the Constitution of the United States, because:

(a) When considered in conjunction with Chapter 31, Session Laws of New Mexico for 1931, said Chapter 176 constitutes merely a compensatory and regulatory exaction for the use of the public highways of the State of New Mexico.

(b) Even if said Chapter 176 should be construed as applied to appellee as an excise tax upon the use of gasoline

in interstate commerce, it is justifiable as a compensatory and regulatory exaction for the use of state facilities.

(c) The Supreme Court of New Mexico has not construed said Chapter 176, Laws of 1933, in conjunction with Chapter 31, Laws of 1931, so that its application to appellee will be a violation of Article 1, Section 8, Clause 3 of the Constitution of the United States, and

(d) The characterization of Chapter 176, Laws of 1933, by the Supreme Court of New Mexico is not binding upon the Supreme Court of the United States where the question involved is one of deprivation of rights secured by the Federal Constitution.

MATERIAL STATUTORY AND CONSTITUTIONAL PROVISIONS

The period covered by this litigation runs from April, 1932, until May 25, 1935. The tax claimed by appellants to be due from April, 1932, to June, 1933, arose under Chapter 29, New Mexico Session Laws of 1929, Section 60-101, New Mexico Statutes Annotated, Compilation of 1929, which reads as follows:

> "There is hereby levied and imposed an excise tax of five cents per gallon upon the use of all gasoline and motor fuel used in this state for any purpose; Provided, that in the collection of such tax a deduction shall be allowed of the amount of the excise tax paid in this state by distributors or dealers upon the sale of the gasoline so used."

There was also effective at this time Section 60-203, New

Mexico Statutes Annotated, Compilation of 1929, which provided:

> "There is hereby levied and imposed an excise tax of five cents per gallon upon the sale of all gasoline sold in this state except gasoline sold in original packages or containers as purely interstate commerce sales."

During all of the period from April, 1932, to June, 1933, there was also in effect Chapter 31 of the New Mexico Session Laws of 1931. This act was entitled as follows:

> "An Act to Provide For Refunding The Excise Taxes Paid on Gasoline or Motor Fuel Purchased and Used By Consumer Other Than in Motor Vehicles Operated or Intended to be Operated on Any of The Public Streets or Highways of The State of New Mexico; etc."

Section 1 of this act provided:

> "Section 1. That every person, firm, partnership, corporation or association having paid for any one purchase, the excise tax to a distributor or wholesaler upon fifty-six (56) or more gallons of gasoline or motor fuel, which gasoline or motor fuel was purchased and used solely and exclusively by such person, firm, partnership, corporation or association other than in motor vehicles operated or intended to be operated upon any of the public streets or highways in the State of New Mexico, shall be entitled to a refund equal to the amount of tax so paid, upon compliance with the provisions of this act, and not otherwise."

The statutes above quoted were all effective until 1933 when the 1933 Legislature repealed the two sections above

quoted levying the gasoline tax and adopted instead Section 2, Chapter 176, New Mexico Session Laws of 1933, as follows:

> "There is hereby levied and imposed an excise tax of five cents (5c) per gallon upon the sale and use of all gasoline and motor fuel sold or used in this state for any purpose except gasoline sold in interstate commerce, Provided, that this tax shall be collected only once upon any particular motor fuel, and where the excise tax has been paid in this state by distributors or dealers upon the sale a like tax shall not be collected for the use of the same motor fuel; Provided, however, that nothing in this Act shall prohibit any incorporated municipality from assessing and collecting the tax provided for in Chapter 159 of the 1931 Session Laws."

The same Legislature amended the gasoline refund statute, Chapter 31 of the Laws of 1931, by Chapter 162 of the Laws of 1933, but the only pertinent change made in the refund law of 1933 was to change the minimum purchase from fifty-six (56) gallons to fifty (50) gallons.

The 1933 statutes just referred to were effective from their effective dates in 1933 to the beginning of this action in the lower Court.

The proceeds of the New Mexico state gasoline tax are distributed in accordance with Section 60-205 of the New Mexico Statutes Annotated, Compilation of 1929, which provided:

> "The proceeds of said tax, except such portion thereof as may be necessary to pay the principal and interest of debentures issued hereunder, shall be paid into the state treasury and covered into the state road fund to be used for maintenance, construction and im-

provement of state highways and to meet the provisions of the federal aid road law."

The Federal Constitutional provision involved herein is Article 1, Section 8, Clause 3 of the Constitution of the United States which provides:

"The Congress shall have power * * * to regulate commerce with foreign nations, and among the several states, and with the Indian tribes;"

ARGUMENT

I. WHEN CONSIDERED IN CONJUNCTION WITH CHAPTER 31, SESSION LAWS OF NEW MEXICO FOR 1931 AND THE AMENDMENTS THERETO, SAID CHAPTER 176 CONSTITUTES MERELY A COMPENSATORY AND REGULATORY EXACTION FOR THE USE OF THE PUBLIC HIGHWAYS OF THE STATE OF NEW MEXICO.

By the decree entered in the lower Court the defendants were enjoined from "arresting or causing or authorizing the arrest of plaintiff, or its agents or employees, or otherwise preventing or interfering with plaintiff in its conduct of its operation of busses as a common carrier of passengers and property for compensation over the public highways of the State of New Mexico in interstate commerce, because of any alleged non-compliance with Chapter 176 of the Session Laws of 1933 of the State of New Mexico so far as relates to gasoline or other motor fuel purchased by plaintiff, within other states than the State of New Mexico, and placed or to be placed in its vehicles in other states than the State of New Mexico, and used in said vehicles for the propelling of the same in interstate commerce within the State of New Mexico; and from enforcing said statute in any other manner against this plaintiff or its predecessors in interest by reason of the use of gasoline or other motor fuel within the State of New Mexico that shall have been or shall be acquired, or purchased and placed in vehicles outside of the State of New Mexico, and used as aforesaid." (Tr. 41 et seq.)

That portion of Chapter 176, Laws of 1933, which imposes the tax, application of which to the appellee has been enjoined by the lower Court, reads as follows:

"Section 2. There is hereby levied and imposed an excise tax of five cents (5c) per gallon upon the sale and use of all gasoline and motor fuel sold or used in this state for any purpose except gasoline sold in interstate commerce, Provided, that this tax shall be collected only once upon any particular motor fuel, and where the excise tax has been paid in this state by distributors or dealers upon the sale a like tax shall not be collected for the use of the same motor fuel; Provided, however, that nothing in this Act shall prohibit any incorporated municipality from assessing and collecting the tax provided for in Chapter 159 of the 1931 Session Laws."

The appellants contended below and now contend that the imposition of this tax when construed in the light of Chapter 31, Laws of 1931, constitutes merely a compensatory and regulatory exaction for the use of state facilities, to-wit: the public highways of the state. Section 1 of Chapter 31, Laws of 1931, provides:

"That every person, firm, partnership, corporation or association having paid for any one purchase, the excise tax to a distributor or wholesaler upon fifty-six (56) or more gallons of gasoline or motor fuel, which gasoline or motor fuel was purchased and used solely and exclusively by such person, firm, partnership, corporation or association other than in motor vehicles operated or intended to be operated upon any of the public streets or highways in the State of New Mexico, shall be entitled to a refund equal to the amount of tax so paid, upon compliance with the provisions of this act, and not otherwise."

It is stipulated that the gasoline taxes collected by the State of New Mexico under the provisions of Chapter 176, Laws of 1933, are distributed in accordance with the pro-

visions of Section 60-205, New Mexico Statutes Annotated, 1929 Compilation, (Tr. 32) which latter section reads in part as follows:

> "The proceeds of said tax, except such portion thereof as may be necessary to pay the principal and interest of debentures issued hereunder, shall be paid into the state treasury and covered into the state road fund to be used for maintenance, construction and improvement of state highways and to meet the provisions of the federal aid road law."

It is apparent from the foregoing that the entire proceeds of the tax in question has, at all times material to this discussion, been allocated to highway purposes. This is a strong indication that the tax was levied only as compensation for the use of the highways. In Interstate Transit, Inc., vs. Lindsey, 283 U. S. 183, 75 L. Ed. 953, this court said:

> "While a state may not lay a tax on the privilege of engaging in interstate commerce (Sprout vs. South Bend, 277 U. S. 163, 72 L. Ed. 833, 62 A.L.R. 45, 48 S. Ct. 502), it may impose even upon motor vehicles engaged exclusively in interstate commerce a charge, as compensation for the use of the public highways, which is a fair contribution to the cost of constructing and maintaining them and of regulating the traffic thereon. (Kane vs. New Jersey, 242 U. S. 160, 168, 169, 61 L. Ed. 222, 227, 228, 37 S. Ct. 30; Clark v. Poor, 274 U. S. (186) 554, 71 L. Ed. 1199, 47 S. Ct. 702; Sprout vs. South Bend, supra (277 U. S. 169, 170, 72 L. Ed. 836, 837, 62 A.L.R. 45, 48 S. Ct. 502.) As such a charge is a direct burden on interstate commerce, the tax can not be sustained unless it appears affirmatively, in some way, that it is levied only as compensation for use of the highways or to defray the expense of

> regulating motor traffic. This may be indicated by the nature of the imposition, such as a mileage tax directly proportioned to the use (Interstate Busses Corp. vs. Blodgett, 276 U. S. 245, 72 L. Ed. 551, 48 S. Ct. 230), or by the express allocation of the proceeds of the tax to highway purposes, as in Clark v. Poor, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702, supra, or otherwise. Where it is shown that the tax is so imposed, it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory. Hendrick vs. Maryland, 235 U. S. 610, 612, 59 L. Ed. 385, 35 S. Ct. 140; Interstate Busses Corp. vs. Blodgett, 276 U. S. 245, 250-252, 72 L. Ed. 551, 554, 555, 48 S. Ct. 230. Compare Interstate Busses Corp. vs. Holyoke Street R. Co. 273 U. S. 45, 51, 71 L. Ed. 530, 534, 47 S. Ct. 298."

If, as stated above, a state "may impose even upon motor vehicles engaged exclusively in interstate commerce a charge as compensation for the use of the public highways," why may it not impose a similar charge upon *gasoline* used exclusively in interstate commerce? This Court has many times affirmed and reaffirmed the doctrine that a state may exact of interstate commerce a reasonable and non-discriminatory charge for the use of state facilities. See Clark vs. Poor, 274 U. S. 554, 71 L. Ed. 1199; Hendrick vs. Maryland, 235 U. S. 610; Interstate Busses Corporation vs. Blodgett, 276 U. S. 245, 73 L. Ed. 551; Kane vs. New Jersey, 242 U. S. 159, 61 L. Ed. 228.

Appellee has not contended below and we assume will not contend here that the tax in question is either discriminatory or unreasonable. It is apparent that it bears a direct relation to the use of the highways since the gasoline is used on the highways for the propulsion of appellee's motor busses. (See Stipulation of Facts, Tr. 30).

As stated in Hendrick vs. Maryland, supra, with reference to charges imposed on interstate commerce for the use of state facilities "the amount of the charges and the method of collection are primarily for determination by the state itself." If a state may impose such a charge on motor busses, why may it not employ a different method of collection, namely, the imposing of a similar charge upon gasoline used in such busses—the result is the same.

The majority of the Court below seem not to have any serious doubt upon this score as is evidenced by the following portion of their opinion:

> "The right to carry on interstate commerce gives plaintiff no right to use state highways or parks in the state house grounds as a garage, without paying a fair charge therefor. Clark vs. Poor, 274 U. S. 554; Carley & Hamilton, Inc., vs. Snook, 281 U. S. 66; Interstate Busses Corp. vs. Blodgett, 276 U. S. 245; Continental Baking Co. vs. Woodring, 286 U. S. 352. It is neither charged nor proven here that five cents a gallon is, together with the modest mileage charge laid by another statute, such an exorbitant charge as to be a tax disguised as compensation, nor that the method has no reasonable relation to the use made for the highways. We know that the heavier and faster the bus, the more damage it does to the highways, and in rough approximation, the more gasoline it uses. If the legislature, by this statute, exacted compensation for the use of the highways, plaintiff must fail."

The difficulty seems to be in determining whether or not the charge imposed by the New Mexico statutes referred to is a compensatory exaction for the use of the highways. As applied to appellee we can not see what else it could be. There is no contention that appellee uses gasoline for any other purpose than to propel its motor busses over the pub-

lic highways of New Mexico. The tax imposed is in direct relation to the amount of gasoline so used. The entire proceeds of the tax go to the support and maintenance of the state highways. What other purpose could it have than to compel appellee and other similarly situated to bear their just proportion of the expense of constructing and maintaining the state's highways? The answer was made below that by the terms of the statute the tax is imposed not only upon the use of gasoline upon the highways but upon its use for any purpose. That is true, but as applied to appellee the tax is imposed only for gasoline used on highways. Even though the tax might be imposed on other users of gasoline, it is common knowledge that a large part of the gasoline used in all states is used to propel motor vehicles over the public highways.

In 1929 a taxing statute was passed similar to the one in question, being Chapter 29, Laws of 1929, (Sec. 60-101, 1929 Compilation), which reads as follows:

> "60-101. Five cents per gallon excise tax. There is hereby levied and imposed an excise tax of five cents per gallon upon the use of all gasoline and motor fuel used in this state for any purpose; Provided, that in the collection of such tax a deduction shall be allowed of the amount of the excise tax paid in this state by distributors or dealers upon the sale of the gasoline so used."

When the 1929 statute, above quoted, was enacted, it seems reasonable to us that the New Mexico Legislature intended to exact of users of the highways compensation for such use and in order to avoid evasion of the tax it compelled non-users of the highways to also contribute to their upkeep. One purpose of the tax is plain, namely, to acquire funds with which to build and maintain highways.

Since the Legislature was undoubtedly aware that a large part of the gasoline sold and used in this state would be used on the public highways it seems equally plain that it intended to exact of such users a reasonable compensation.

The 1933 statute is not materially different from the 1929 statute above quoted, but it is important to note that it was passed by the Legislature with the presumed knowledge that Chapter 31, Laws of 1931, was in full force and effect. The 1931 statute, which has been quoted above, makes provision for the refund of all gasoline taxes where the gasoline is used "other than in motor vehicles operated or intended to be operated upon any of the public streets or highways in the State of New Mexico." Having in mind this refund provision, it seems almost beyond question that the New Mexico Legislature intended that Chapter 176, Laws of 1933, should merely provide a method of collecting compensation for the use of the highways. The two statutes should be construed in *pari materia*. U. S. vs. Collier, 3 Blatch 325, 25 Fed. Cases No. 14833.

It is true that the Legislature might have exempted nonusers of the highways from payment of the tax, but, as pointed out by Judge Bratton in his dissenting opinion in the Court below, this would have involved obvious administrative difficulties and, after all, what great difference does it make whether the tax is collected from all users of gasoline and refunded to those not using it on the highways, or whether it is collected in the first place from only those who use (or say they intend to use) such gasoline on the public highways of the state? The practical effect and operation of the statute is the same in either case, and it is upon its practical operation and effect that the question of whether or not a state statute deprives a party of right secured by

federal constitution depends. (See American Manufacturing Co. vs. St. Louis, 250 U. S. 459, 63 L. Ed. 1084).

We do not find a case in which this Court has passed upon the validity of a gasoline tax as applied under conditions the same as those existing in the present case. However, we do find decisions of other courts upon state gasoline tax statutes which reflect views the same or similar to those we have expressed. In the case of Varney Air Lines vs. Babcock, 1 Fed. Sup. 687, the Court held that a state gasoline tax of five cents (5c) per gallon might be levied and collected from an interstate carrier who bought gasoline outside of the state but used it within the state where the use within the state involved the use of state facilities. We believe that the reasoning and principle evoked in the Varney case, supra, is applicable to the case at bar, but submit that in the case before this Court the situation is even stronger to uphold the tax for the reason that the tax imposed is more closely related to the actual use and benefit by the plaintiff of the state facilities.

Another case to which we wish to call the Court's attention as being closely in point to the case at bar is State vs. Johnson, decided by the Supreme Court of Louisiana in 1931 as reported in 138 South. 503. In that case the State of Louisiana levied a tax of four cents (4c) per gallon on all gasoline sold, used or consumed in the state. The defendant was a common carrier engaged partly in interstate and partly in intrastate business. The gasoline in question was purchased outside of the State of Louisiana but used in defendant's motor busses on the highways within the State of Louisiana. In deciding this case the Court reviewed most of the cases cited by plaintiff herein but held them not to be applicable in the following language:

"The gasoline tax levied under the statutes of this state is solely for the purposes of building and maintaining highways and bridges which belong to the state. Every dollar of it is allocated to the highway fund. The defendant company, while engaged in interstate traffic, makes the public highways of the state their "place of business." It is a fact conceded by all that motorbuses for carrying passengers and motortrucks for hauling freight, due to their great weight and the high speed at which they travel, do more damage to the public roads than perhaps all other traffic combined. Their use of the highways throws a heavy burden upon the state in the way of maintenance and upkeep. The state can not be called upon to carry this burden of expense without recompense. 'Upon the theory that interstate business must 'pay its way', those who are engaged therein must pay their just and reasonable proportion of the expense of building and maintaining the roads which they use."

We do not overlook the case of Helson vs. Kentucky, 279 U. S. 245, 73 L. Ed. 683, but will discuss it under another point in this brief.

II. THE SUPREME COURT OF NEW MEXICO HAS NOT CONSTRUED SAID CHAPTER 176, LAWS OF 1933, IN CONJUNCTION WITH CHAPTER 31, LAWS OF 1931, SO THAT ITS APPLICATION TO APPELLEE WILL BE A VIOLATION OF ARTICLE 1, SECTION 8, CLAUSE 3, OF THE CONSTITUTION OF THE UNITED STATES.

The opinion of the majority of the three-judge Court below leads us to believe that it might have reached a different conclusion were it not for two decisions of the Supreme Court of New Mexico—Breece Lumber Co. vs. Mirabal, 34 N. M. 643, 287 P. 699, and Trancontinental & Western Air,

Inc., vs. Lujan, 36 N. M. 64, 8 P. (2nd) 103. We do not attribute to these two decisions the fatal consequences given them by the majority. The dissenting opinion of Circuit Judge Bratton seems to afford a complete answer to the conclusions of the majority on this point.

We may perhaps be presumptuous in attempting to add anything to the able opinion of Judge Bratton, but due to the great importance of the case to appellants and the far reaching effect of the lower Court's decision upon the taxing policy of the State of New Mexico, we feel impelled to express in our own language the reasons which occur to us why the two New Mexico decisions referred to are not controlling in the present case.

In the first place, neither decision attempts to construe Chapter 176, Laws of 1933, the statute now subject to attack. The Breece Lumber Company case was decided March 31, 1930, about a year before Chapter 31, Laws of 1931, the refunding statute, was enacted. Both decisions have reference to and construe Chapter 29, Laws of 1929. Although the language of Chapter 176, Laws of 1933, is similar to that of the 1929 statute in the same way that it construed the 1929 statute, especially in view of the fact that the 1933 statute was enacted shortly after the passage of the refunding act of 1931. But supposing for the sake of argument that it might, if called upon, place a like construction upon the 1933 statute, *it has not yet done so.*

In the Transcontinental case, supra, the New Mexico Court on rehearing mentioned the refunding statute in the following language:

> "Since this suit was instituted the Legislature has made provision for refunds to purchasers of gasoline for use otherwise than in motor vehicles operated on

> the highways. Laws 1931, c. 31. Appellee suggests that this may well be considered as a legislative construction of 1929 Comp. sec. 60-203, and as evincing legislative intent to exempt gasoline sold for aircraft use. The history of gasoline tax legislation in this state will not warrant such construction."

As so clearly pointed out by Judge Bratton and so plainly appears from the language of the New Mexico Court, no rights were involved which accrued subsequent to the enactment of the 1931 refunding statute. Consequently there was no occasion for construing the two statutes in *pari materia* and the court did not do so. All that can be said of these two decisions is that they construe *Chapter 29, Laws of 1929,* with reference to the facts before the Court, thereby giving to the statute a meaning *as of the time of its enactment.* However, even if we maintain, as we should and do, "a decent respect for these opinions of the highest court of New Mexico" we still do not agree with the conclusion reached by the majority of the lower Court. We assert that neither decision has announced any doctrine necessarily fatal to appellants' cause. We are here concerned with the use tax. We call attention to the following language of Justice Watson in the case of Transcontinental and Western Air, Inc., vs. Lujan:

> "The use tax comes to this: For the privilege of traversing New Mexico in the air, of landing on our soil, and of transporting mail and passengers into and out of our state, we exact a price measured by the quantity of gasoline consumed." (36 N. M. 67).

If the learned justice had been dealing with facts now before this Court, might he not have said "For the privilege of traversing New Mexico over the public highways and of using the highways of this state, owned and maintained at

great expense by the state and especially built to withstand the tremendous wear and tear caused by large and heavy motor busses used in interstate commerce, we exact a price measured by the quantity of gasoline consumed."

The decision of the lower Court in this case seems to be based on the assumption that in view of the New Mexico decision referred to, Chapter 176, Laws of 1933, imposes a "tax" upon the use of an instrumentality of interstate commerce rather than a "charge" for the use of state-owned facilities, that it therefore directly burdens interstate commerce, and consequently is beyond the power of the state to impose. Whether we call it a "tax" or a "charge" seems to us of little consequence. Many "charges" are exacted in the form of excise or license taxes. Kane vs. New Jersey, supra; Hendrick vs. Maryland, supra. In referring to the power of states to exact from interstate commerce compensation for the use of state facilities this Court, in a most recent opinion handed down December 9, 1935, in the case of Clyde Mallory Lines vs. Alabama, said:

> "Its most recent manifestation is the *levy of a tax* which represents a reasonable charge upon interstate automobile traffic passing over state highways, upheld in Kane vs. New Jersey, 242 U. S. 160; Clark vs. Poor, 274 U. S. 554; Interstate Busses Corporation vs. Blodgett, 276 U. S. 245; Hendrick vs. Maryland, 235 U. S. 610." (Italics ours).

It does not seem to make any difference in a case of the kind now under consideration that interstate commerce may be directly burdened. In Interstate Transit, Inc., vs. Lindsey, supra, this Court, in referring to a charge as compensation for the use of public highways, said:

"Such a charge is a direct burden on interstate commerce."

The critical question of whether a state statute as applied to a particular situation levies a tax upon the privilege of engaging in interstate commerce, or whether it merely exacts a charge for the use of state facilities, seems to us to depend upon the purpose the Legislature had in mind in adopting it. That purpose may be indicated by the disposition made of the proceeds, by the manner of applying the tax to users of the highways, by proportioning the burden of the tax to the amount of such use and possibly in other ways. It can not be denied that the tax here in question is peculiarly fitted to exact of highway users an amount in direct proportion to the use enjoyed. Heavy busses and trucks do more damage to the highways than lighter vehicles, use more gasoline and consequently pay more tax. Frequent operations cause more wear and tear to the highways than occasional operations, result in greater gas consumption, and a proportionately higher tax burden. Having in mind these commonly known facts we feel that the New Mexico Legislature must have purposed that the 1933 gasoline tax act, as applied to highway users, should exact from them a compensation for such use. Nothing in either of the two New Mexico decisions relied upon in the lower Court by the appellee negatives such a conclusion.

III. EVEN IF SAID CHAPTER 176 SHOULD BE CONSTRUED AS APPLYING TO APPELLEE AS AN EXCISE TAX UPON THE USE OF GASOLINE IN INTERSTATE COMMERCE, IT IS JUSTIFIABLE AS A COMPENSATORY AND REGULATORY EXACTION FOR THE USE OF STATE FACILITIES.

We have heretofore pointed out under Point I of the Argument in this brief that the state may exact of interstate commerce a reasonable and non-discriminatory compensation for the use of state facilities. This rule has long been established by this Court. In that portion of our brief just referred to we have cited numerous cases to support this view and we redirect the Court's attention to these cases at this point.

Appellee will urge that if this tax imposed by the New Mexico statute is a tax upon the use of gasoline in motor vehicles instead of a tax for the privilege of using the state highways measured by the number of gallons of gasoline used thereon that it is invalid under the rule of Helson vs. Kentucky, supra. This also seems to have been the real basis of the decision of the lower Court. We of course do not concede that the New Mexico tax is a tax upon the use of gasoline, but rather contend that it is a tax for the use of the public highways of the State of New Mexico. We submit, however, that even should this Court take the view that the New Mexico tax in question is a tax upon the use of gasoline that this case should not be governed by the rule of the Helson case.

In the Helson case there was no question whatever of the use of state facilities. The ferry-boat which was using the gasoline attempted to be taxed by the State of Kentucky was being operated on a river. There is no intimation in that case that the boat was docked at a publicly owned dock

nor that the state contributed in any manner towards the maintenance of any facilities used in the operation of the ferry-boat. Here we have an entirely different situation. It must be conceded that all of the roads over which the motor busses using the gasoline attempted to be taxed in this case are owned by the State of New Mexico. The state has expended vast sums of money in the building of these roads. It expends further large sums annually for their maintenance. Every penny of the proceeds of the gasoline tax here in question is used by the state either in paying off the bonded obligations already incurred in building these highways or in the cost of maintaining them with the exception of a small percentage of the proceeds used in administrative purposes in collecting the taxes so imposed.

Applying the well established rule illustrated in the cases of Interstate Busses Corporation vs. Blodgett, Clark vs. Poor, supra, Interstate Transit, Inc., vs. Lindsey, supra, that even interstate commerce must pay its way when using state owned and maintained facilities, we submit that the rule in the Helson case is not applicable and must be qualified by this Court to the extent that where the use of such state facilities is involved and the tax imposed is a reasonable, non-discriminatory exaction of compensation for the use of such facilities, that the method of collecting such compensation is immaterial. This Court, in the Helson case, pointed out that gasoline used to propel vehicles in interstate commerce is an instrumentality of interstate commerce and as such can not be taxed but where this Court has also sustained taxes upon motor busses themselves engaged in interstate commerce when such tax is levied as compensation for the use of public facilities, we can not see the vice of levying the tax upon the gasoline used to propel a vehicle when a tax for the same purpose upon the vehicle

itself would be valid. We submit that the language of the Court used in the Helson case supports this position. The Court in that case said:

> "A tax laid upon the use of the ferry-boat would present an exact parallel."

So we contend here that since this Court has sustained taxes levied on vehicles used in interstate commerce when levied as compensation for the use of public facilities. These are exact parallels to a tax levied upon the use of gasoline in such vehicles when levied as compensation for the use of state facilities.

In speaking of this principle in the case of Hendrick vs. Maryland, supra, the Court said:

> "The amount of the charges and *the method of collection are primarily for determination by the state itself;* and so long as they are reasonable and are fixed according to some uniform, fair and practical standard, they constitute no burden on interstate commerce. Transportation Company vs. Parkersburg, 107 U. S. 691, 692; Huse vs. Glover, 119 U. S. 543, 548, 549; Monongahela Navigation Company vs. United States, 148 U. S. 312, 329, 330; Minnesota Rate Cases, 230 U. S. 352, 405; and authorities cited." (Italics our own.)

And again this Court recognized specifically that a tax might be laid directly upon interstate commerce as its reasonable compensation for the use of public facilities in Interstate Transit, Inc., vs. Lindsey, supra, in these words:

> "If such a charge is a direct burden on interstate commerce, the tax can not be sustained *unless it appears affirmatively some way that it is levied only as*

compensation for use of the highways or to defray the expense of regulating motor traffic. This may be indicated by the nature of the imposition such as a mileage tax directly proportioned to the use (Interstate Busses Corporation vs. Blodgett, 276 U. S. 245, 72 L. Ed. 551, 41 S. Ct. 230), *or by the express allocation of the purpose of the tax to highway purposes,* as in Clark vs. Poor, 274 U. S. 554, 71 L. Ed. 1199, 47 S. Ct. 702, supra, or otherwise. *Where it is shown that the tax is so imposed it will be sustained unless the taxpayer shows that it bears no reasonable relation to the privilege of using the highways or is discriminatory.*" (Italics our own.)

Taking this language last above quoted as our guide in this case, we submit that there can be no question but what the New Mexico tax in question is valid as applied to appellee.

We call the Court's attention to two exhaustive and helpful annotations dealing with the whole subject here under discussion. The first is an annotation following the case of Foster & Creighton Company vs. Graham (Tenn.), 285 S. W. 570, in 47 A.L.R. 980, and a later supplementary annotation following the case of Gregg Dyeing Company vs. Query, 286 U. S. 472, 76 L. Ed. 1232, 52 S. Ct. 631, appearing in 84 A.L.R. 839. These two annotations contain, we believe, all of the decided cases dealing with gasoline tax statutes up to the time of their compilation.

IV. The Characterization of Chapter 176, Laws of 1933, By the Supreme Court of New Mexico Is Not Binding Upon the Supreme Court of the United States Where the Question Involved Is One of Deprivation of Rights Secured by the Federal Constitution.

The majority opinion of the Court below seems to us to have been based almost solely upon the proposition that the Supreme Court of the State of New Mexico in the Breece Lumber Company case, supra, and the TWA Airline case, supra, had characterized the state statute in question as a use tax on the use of gasoline and that by this characterization the Federal Court was bound. Indeed, the majority opinion states:

> "Free to construe this statute *a priori*, the fact that the proceeds of the sales tax, and perhaps of the use tax, go exclusively to highway financing, would be most persuasive. * * *
>
> But we are not free. The New Mexico statute means what the New Mexico Supreme Court says it means."

We do not agree that the New Mexico Supreme Court in the cases referred to interpreted the statute in the manner held by the lower Court, but conceding for the sake of argument that the New Mexico Supreme Court had characterized the statutes in question in this manner, we submit that the lower Court was in error in assuming that it was absolutely bound by such characterization.

We have here appellees contending that the statute is unconstitutional as attempted to be applied in the situation here in question, that it thus invades a right guaranteeing appellee under the Federal Constitution, to-wit: a violation of the commerce clause of the Federal Constitution. By a

well established principle of law in such instances, neither the name of the statute, its interpretation or characterization by a state court is binding upon the Federal courts.

This Court said in the case of American Manufacturing Company vs. St. Louis, 250 U. S. 459, 63 L. Ed. 1084:

> "As a matter of construction this, upon familiar principles, is conclusive upon us. But, as has been held very often, *the question whether a state law or a tax imposed thereunder deprives a party of rights secured by the Federal Constitution depends not upon the form of the act, nor upon how it is construed or characterized by the State Court, but upon its practical operation and effect.*"

To the same effect see St. Louis Southwestern Railway Company vs. Arkansas, 235 U.S. 350, 362, 59 L. Ed. 265, 271, 35 S. Ct. Rep. 99; Mountain Timber Company vs. Washington, 243 U. S. 219, 237, 61 L. Ed. 685, 696, 37 S. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927; Crew Levick Company vs. Pennsylvania, 245 U. S. 293, 294, 62 L. Ed. 295, 297, 38 S. Ct. Rep. 126; Henderson vs. Mayor of New York, 92 U. S. 259, 268; Williams vs. Mississippi, 170 U. S. 213, 225; Smith vs. St. Louis and Southwestern Railway, 181 U. S. 248, 257; Stockard vs. Morgan, 185 U. S. 27, 37; Reid vs. Colorado, 187 U. S. 137, 151; Galveston, Harrisburg Railway vs. Texas, 810 U. S. 217, 227; Western Union Telegraph Company vs. Kansas, 216 U. S. 146, 162; Sioux Remedy Company vs. Cope, 235 U. S. 197; Macellan Company vs. Massachusetts, 279 U. S. 630, 73 L. Ed. 874; Gregg Dyeing Company vs. Query, supra.

We believe that this principle is most surely applicable in the present case and in looking at the practical effect

and operation of the statute it can be held only as a compensatory tax for the use of public highways in the state.

CONCLUSION

We submit that the decree of the lower Court enjoining appellants from enforcing the statutes in question as against the operations of appellees is erroneous and should be reversed.

Respectfully submitted,

FRANK H. PATTON,
Attorney General,
Santa Fe, New Mexico.

J. R. MODRALL,
Assistant Attorney General,
Santa Fe, New Mexico.

QUINCY D. ADAMS,
Assistant Attorney General,
Santa Fe, New Mexico.

Attorneys for Appellant.